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No. 94-1245

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EUGENE F. BEVACQUA,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. District Court's error in requiring malice for intentional torts not dispositive of Petitioner's claim 2

B. District Court's error that Petitioner's contributory negligence was a defense to a battery not dispositive of Petitioner's claim 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES: Page

Rayonier v. U.S.,
352 U.S. 315, 1 L.Ed. 2d 354, 77 S.Ct. 374 (1957) 3

U.S. v. Muniz,
374 U.S. 150, 10 L.Ed. 2d 805, 83 S.Ct. 1850 (1963) 3-4

STATUTES:

19 U.S.C. § 482 6
28 U.S.C. § 2674 3

I.C. § 6-801 4
I.C. § 6-904 3

MISCELLANEOUS

6 Am.Jur. 2d, Assault and Battery, § 153 5

W. Prosser, Law of Torts, 4th Ed., pp. 98-116 5-6

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In its brief in opposition, the Government raises two new issues which Petitioner feels mandate this reply brief. The Government argues that the district court found malice, was required to prove a claim for battery in Idaho, and that such finding is dispositive of Petitioner's claim. The Government also argues that the district court's finding of negligence on the part of the Government and the Petitioner is dispositive. Both of these issues were argued to the Ninth Circuit Court of Appeals and that court

avoided the issues, finding, in error, that a retaliatory search with no suspicion whatsoever was routine. The Government's contention that the district court's rulings on "malice" and on "negligence" are dispositive is erroneous.

A. District Court's error in requiring malice for intentional torts not dispositive of Petitioner's claim.

In addition to committing the error of determining that the intentional torts of battery, false arrest, and false imprisonment were not cognizable under the Federal Tort Claims Act, the district court erred when it determined that Petitioner could not recover damages for these intentional torts without a finding of malice. In this regard the district court stated:

> Mr. Bevacqua may have had a viable action against Inspector Barnhart pursuant to a civil action for false arrest under I.C. § 18-2901, as stated by the court in Richardson, supra or an action against Barnhart for claims of assault, battery, or false imprisonment under state law. However, under the Idaho Tort Claims Act, I.C. § 6-904, a governmental entity can not be held liable for damages due to assault, battery, or false arrest without a finding of malice or criminal intent. Malice within the definition of the ITCA means 'actual malice' which requires a wrongful act without justification combined with ill will. Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990). The court finds that the evidence did not establish that Agent Barnhart acted with malice or criminal intent.
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> * * *
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> **Therefore, this court finds that even if Mr.Bevacqua's claims of assault, battery, and false arrest against the United States were not specifically precluded under the federal Tort Claims Act, as they are, Mr. Bevacqua would not be able to hold a governmental entity such as a municipality liable under Idaho law for claims of assault, battery, false arrest, or false imprisonment. (Appendix at 35a-37a)**

The district court reached this erroneous conclusion by failing to realize that liability under the Federal Tort Claims Act, 28 U.S.C. § 2674, is to be judged "in the same manner and to the same extent as a private individual under like circumstances". On the contrary, the district court held that because an Idaho governmental entity cannot be held liable for damages for battery or false arrest without a finding of malice under the Idaho Tort Claims Act, I.C. § 6-904, that such a finding of malice was required under the Federal Tort Claims Act.

Under the Federal Tort Claims Act, the liability of the United States is determined in the same manner as if the United States was a "private individual" not a state governmental body. In *Rayonier v. U.S.*, 352 U.S. 315, 1 L.Ed. 2d 354, 77 S.Ct. 374 (1957) this Court stated:

> But as we recently held in Indian Towing Co. v. United States, 350 US 61, 100 L ed 48, 76 S Ct 122, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. We expressly decided in Indian Towing that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations...

Rayonier at p.358.

Also, this Court in *U.S. v. Muniz*, 374 U.S. 150, 10 L.Ed. 2d 805, 83 S.Ct. 1850 (1963) stated:

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> Just as we refused to import the 'casuistries of municipal liability for torts' in Indian Towing, so we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity. . . .

Muniz at p.816.

There simply is no question but that the liability of the United States in a Federal Tort Claims Act case is not determined by any restrictions which pertain to state governmental entities, but is determined by comparing the actions of the United States to an individual person in each state. The district court's determination that a finding of malice was a requirement for Petitioner's intentional tort claims of battery, false arrest, or false imprisonment is patently wrong and the district court's determination is not dispositive of Petitioner's claim.

B. District Court's error that Petitioner's contributory negligence was a defense to a battery not dispositive of Petitioner's claim.

The district court's errors in determining that intentional torts were not cognizable under the FTCA and that proof of malice was necessary to recover under an intentional tort theory, led the district court to yet another error. Because the district court erroneously found that Petitioner could not, in the absence of malice, recover through any intentional tort theory under the FTCA, the district court wrongly treated the case as simply a negligence case. The court then determined that the Government was 50% negligent, that Petitioner was 50% negligent and that pursuant to§ 6-801, I.C. Petitioner's negligence claim was barred. In this regard, the district court stated:

Idaho has a comparative negligence statute which applies to all negligence actions where there is negligence attributable to the person seeking to recover. See Harrison v. Taylor, 115 Idaho 588, 768 P.2d 1321 (1989). Idaho Code § 6-801 (1987 Supp.) provides in pertinent part:

> 'Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought . . .'

Under the statute, a plaintiff found to be more than forty-nine percent negligent is barred from any recovery. Seppi v. Betty, 99 Idaho 186, 188, 579 P.2d 683, 685 (1978). (Appendix at 14a) (emphasis added)

This statute mandates that contributory negligence is only a defense and can only act as a bar in an action to recover damages for negligence. Neither this statute nor any other statute or case law in the State of Idaho provides that negligence is a defense to the intentional torts of battery, false arrest, or false imprisonment. Under such intentional torts, there simply is no contributory negligence defense available.

Not only does the Idaho contributory negligence statute mandate this result, but hornbook law throughout the United States is unified on the point that contributory negligence is no defense for intentional torts of battery, false arrest, or false imprisonment. See generally W. Prosser, Law of Torts, 4th Ed., pp. 98-116. Also see 6 Am.Jur. 2d, Assault and Battery, § 153 where, in discussing the intentional tort of battery, the author states:

> The doctrine of contributory negligence does not apply to an action to recover damages for an assault and battery. Negligence of the plaintiff, contributing to the injury of which he complains, is taken into consideration only in those cases where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff, and does not apply to the commission of an intentional or wanton wrong. But contributory negligence on the part of the plaintiff may be a ground for denying punitive damages in an action for assault and battery.

The district court's determination that Petitioner's negligence was as great as that of the Government is of absolutely no consequence in this case. The percentage of negligence would in no way have affected Petitioner's intentional tort claims.

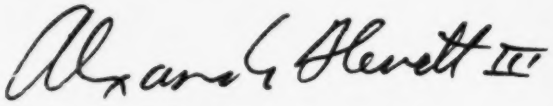
The district court erroneously held, because of its erroneous findings concerning the intentional tort claims, that the case only rested on a negligence claim, and was subject to the defense of contributory negligence. Such finding by the district court is not dispositive of Petitioner's claim.

CONCLUSION

The Government has made no attempt to argue that the initial grabbing of Petitioner by the customs officer was authorized by 19 U.S.C. § 482, the Customs Department manual, or the decisions of the Circuit Courts of Appeal. The record is absolutely undisputed that the customs officer had no suspicion whatsoever when he grabbed Petitioner and the customs officer did so in retaliation. The grabbing and subsequent search was unauthorized and a battery

occurred. For these reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,



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